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CASES / JURISPRUDENCE

Canadian Cases in Private International Law in 2024

Jurisprudence canadienne en matière de droit international privé en 2024

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1. Jurisdiction / Compétence des tribunaux

A. Common law and federal

i. Jurisdiction in personam

Jurisdiction — non-resident defendant — claim for injury to person or damage to property or reputation — attornment — jurisdiction found and not declined

Durand v Higgins, 2024 ABKB 108

The plaintiff, Frédérik Durand, was an electronic music artist based in Quebec. In 2020, the defendant, Michaela Higgins, began reposting allegations of serious sexual impropriety against Durand on an Instagram account. Higgins lived in California and had neither met Durand nor had any first-hand knowledge of the reposted allegations. Durand sued Higgins for defamation, claiming that the false and unsubstantiated allegations destroyed his career.[1] Higgins filed a statement of defence denying the allegations and challenging Alberta's jurisdiction because she had no connection to the province or any direct contact with music producers or promoters in Canada.

Justice Nicholas Devlin of the Court of the King's Bench of Alberta highlighted that the unique nature of social media and the ability to instantaneously publish materials on platforms worldwide creates unique jurisdictional challenges for all courts. Durand argued that Higgins had attorned to Alberta's jurisdiction by filing a statement of defence and subsequently appearing before another judge. Simply filling a statement of defence, however, did not constitute voluntary attornment in Devlin J's view as the purpose of the filing was to contest the jurisdiction. Higgins only protested the lawsuit and took no other steps outside of asserting that the Alberta court lacked jurisdiction.

The author thanks Lauren Da Silva for her research assistance.

[1]Under the *Defamation Act*, RSA 2000, c D-7, s 2.

Devlin J reviewed jurisdiction *simpliciter* and the factors from *Club Resorts v Van Breda*.[2] The only operational presumptive connecting factor was the commission of a tort in Alberta. Defamation has been deemed to take place where the defamatory statements on social media posts are read, accessed, or downloaded by the individuals to whom they are published.[3] Durand provided evidence of cancelled shows in Alberta due to the Instagram posts. Durand established on a balance of probabilities that the tort was committed against him in Alberta, giving the court *prima facie* jurisdiction to hear the case.

Devlin J asked whether the defendant should reasonably expect to be called to answer a legal proceeding in Alberta.[4] The defamatory statements were both seen and acted upon by viewers in Alberta. Similarly, the reputation of Durand was actively and markedly diminished among members of the public in the province due to Higgins's actions. The purpose of the Instagram account was to cancel Durand's career. Higgins intended her posts to make people think poorly of Durand and become aware of what she was posting about him. For this reason, Higgins was unable to rebut the presumptive connecting factor to Alberta.

The court also considered whether it should proceed to exercise jurisdiction through a *forum non conveniens* analysis. Higgins argued that California was clearly the more appropriate forum in terms of fairness and efficiency since that is where she resided and from where the content/posts originated. Devlin J looked at the relevant factors of convenience and the expense for the parties.[5] Higgins had been accommodated to work remotely, saving her travel money. Higgins also submitted that she could not afford a lawyer in Alberta, but the cost difference between Alberta and California was unknown. From the judge's perspective, these considerations made Alberta as fair and workable a jurisdiction as California.

Devlin J continued to look at any juridical advantage for the respondent of the case proceeding in California. Despite the perception that Canada's law on defamation is more restrictive on speech than in the United States, Durand alleged that the defamatory publications were malicious and would meet both the US[6] and Canadian standards.[7] Devlin J found no juridical disadvantage to Higgins under Alberta law or in conducting the litigation in Alberta. Durand was a Canadian citizen and suffered losses in Alberta due to a tortious act committed by Higgins in Alberta, making it an appropriate forum.

Jurisdiction — non-resident plaintiff — claim for injury to person or damage to property or reputation — jurisdiction not found and declined

Matiko John v Barrick Gold Corporation, 2024 ONSC 6240

The defendant, Barrick Gold Corporation, is an international gold mining giant with projects around the world. Its head office is in Vancouver, British Columbia. The plaintiffs brought this action on behalf of their family members who were injured or

[2]2012 SCC 17, [2012] 1 SCR 572 at para 80 [*Van Breda*].
[3]*Haaretz v Goldhar*, 2018 SCC 28 at para 36.
[4]*Ibid* at paras 43–44.
[5]*Van Breda*, *supra* note 2 at para 105.
[6]*New York Times Co v Sullivan*, 376 US 254 (1964).
[7]*Grant v Torstar Corp*, 2009 SCC 61 at paras 97, 126.

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killed at one of Barrick's mining sites in Tanzania. They wanted their claims heard in Ontario because they believed that the Tanzanian court was not adequate for the trial. Barrick argued that the claims should be adjudicated where they occurred with all witnesses and evidence in Tanzania. While Ontario had *prima facie* jurisdiction, this could be rebutted by Barrick.[8] The injuries and deaths that took place at the mine and the acts that led to those harms were located in Tanzania. Given that the mining centres were not operated or overseen from Ontario, the claim did not occur in Ontario, and the alleged human rights claims did not occur in Ontario. Justice Edward Morgan was also adamant that Ontario should not take jurisdiction over these claims since it would risk becoming an international host to cases to which it has no real or substantial connection.[9]

Turning to *forum non conveniens*, Morgan J examined Barrick's top-down management structure. None of the management or board members were located in Ontario. He also considered the Tanzanian legal system. The plaintiffs listed a number of reasons why Tanzania was not a good alternative forum, citing issues in judicial independence and the nature of the legal system.[10] Morgan J rejected this line of argument.[11] He also addressed whether there were judicial advantages to the selection of Ontario as a forum that would be lost if the matter was litigated in Tanzania. The plaintiff alleged that the benefits to litigating in Ontario included a more expansive discovery process, the availability of contingency fees, and the ability to claim breach of obligations owed under international law. They also argued that Tanzania lacked a substantive ground that was central to their claim.

Morgan J stressed that an alternative forum did not have to mimic the Ontario system in every way; just because there were differences did not make one jurisdiction inferior to the other. It did not matter that the law in Tanzania fell short in comparison to Ontario or Canada. In addition, the plaintiffs claimed that they were unable to find a lawyer in Tanzania because they were too poor. While they lived in rural areas, the lawyers worked in urban areas and were fearful of being victimized by the Tanzanian bar. The court noted, however, that the plaintiffs had not reached out to any legal clinics, despite their availability. Tanzania could not be excluded as an appropriate forum because of some weaknesses in its justice system.[12]

Morgan J also considered relevant factors from *Van Breda*.[13] He noted that the law in Tanzania for torts and negligence was similar to the law in Canada and that, since the injuries and tort occurred in Tanzania, it should be litigated there. There would also be no issue in the enforceability of the judgment against Barrick due to its global presence and assets. Convenience and expense favoured Tanzania. All of the witnesses were located in Tanzania, and the plaintiffs would have access to pro bono or subsidized representation. It was impractical to force the witnesses to come to Canada instead of conducting the hearing in Tanzania. The Ontario court would be deprived of relevant evidence compared to a court in Tanzania given the issues in bringing

[8] *Van Breda*, *supra* note 2 at para 90, 95.

[9] Citing interpretation of *Van Breda*, *ibid*, from *Jacubovich v Israel*, 2021 ONSC 3558 at para 97.

[10] *Nevsun Resources Ltd v Araya*, 2020 SCC 5 at para 50–51.

[11] *Ibid* at para 63.

[12] *Tamminga v Tamminga*, 2014 ONCA 478.

[13] *Van Breda*, *supra* note 2 at para 105 and making an analogy to *Das v George Weston Limited*, 2017 ONSC 4129 at para 236, aff'd 2018 ONCA 1053.

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witnesses to Ontario. A trial in Ontario would be unfair to both sides of the action. Tanzania was clearly the more appropriate forum capable of a fair and efficient trial.

Jurisdiction — non-resident defendant — claim for injury to person or damage to property or reputation — jurisdiction found

Altria Group, Inc v Stephens, 2024 BCCA 99[14]

This appeal concerned an action involving the marketing, advertising, design, and sale of products from the JUUL company. The appellant is Altria Group, Incorporated, a US corporation with a business address in Richmond, Virginia. The other defendants included JUUL Labs Canada and JUUL Labs, Incorporated (JUUL USA), referred to collectively as the JUUL defendants. Though it was clear that British Columbia had territorial jurisdiction over the other JUUL defendants, Altria sought a dismissal or stay of the plaintiffs' claim against them but was unsuccessful at the BC Supreme Court. Altria's appeal was also dismissed.

Altria filed two affidavits suggesting that it did not engage in business in Canada. To counter, the respondent filed large volumes of evidence, including emails discussing a collaboration or partnership between Altria and JUUL USA, along with affidavits and cross-examination. Expert evidence suggested that JUUL intentionally and effectively targeted young people. While the targeting of young people was based in the United States, there was an influence through social media in Canada, which increased demand before the product was even released in Canada. JUUL's activities in the United States were also believed to have significantly impacted the Canadian market.

Altria alleged numerous errors made by the trial judge, including failing to consider relevant evidence as well as a misapplication of the framework in *Ewert v Höegh Autoliners AS*.[15] The first ground of appeal concerned the trial judge's findings at the first stage of the *Ewert* framework that Altria's evidence did not negate any involvement by Altria in the advertising or marketing of JUUL products in Canada and fell short of establishing that Altria had done nothing in relation to the Canadian market. Justice Karen Horsman nonetheless found clear engagement with the issues, and the pathway that the judge followed to reach their conclusion was clearly laid out and intelligible. The judge also did not ignore or overlook the evidence.

The appellate court also evaluated whether the judge correctly applied the *Ewert* framework. Altria argued that the judge reversed the onus, placing a burden on Altria to negate the respondents who pleaded that Altria was involved in the marketing or advertising of JUUL products in Canada. Horsman JA was not persuaded by this argument, given the judge's detailed reasons. Altria further argued that, if the judge did not find a presumptive real and substantial connection at the first stage of the analysis, he erred at the second stage by concluding that the presumption was not rebutted.[16] Horsman JA found that this argument misconceived the judge's finding at the first stage along with the evidence and pleaded facts. The judge did not err in finding the pleadings and the evidence provided on the application established a good

[14]Leave to appeal to SCC refused, 41265 (31 October 2024); the lower court decision was previously summarized in Ashley Barnes, "Canadian Cases in Private International Law in 2022" (2023) 60 CYIL 411 at 422.

[15]2020 BCCA 181 [*Ewert*].

[16]As clarified in *Canadian Olympic Committee v VF Outdoor Canada Co*, 2016 BCSC 238 at paras 23–24.

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arguable case. There was no error in the judge's conclusion that the arguments raised (relating to Altria as a separate corporate entity not casually connected to injuries suffered by JUUL consumers in Canada) were insufficient to rebut the presumption of a real and substantial connection.[17] The trial judge correctly found that the BC courts had territorial competence based on Altria's alleged commission of the tort of conspiracy in British Columbia.

Jurisdiction — non-resident defendant — claim for injury to person or damage to property or reputation — jurisdiction found and not declined

Innis et al. v Sunwing Travel Group Inc. et al, 2024 ONSC 1102[18]

The plaintiffs, Jennifer and Daniel, were vacationing in Cuba in May 2017 with a vacation package purchased through Expedia Canada Corporation, Sunwing Vacation Incorporated, and Sunwing Travel Group Incorporated (collectively the Sunwing defendants). The defendants supplied the vacation through their head office in Etobicoke, Ontario. The plaintiffs also purchased a speedboat excursion through a purported Sunwing representative while in Cuba. Toufik Benhamiche and Kahina Bensaadi (the moving parties) were staying at the same resort and were booked on the same excursion. While on the excursion together, one of the moving parties operated the boat causing it to move at such a high speed that he lost control. This loss of control flew one of the plaintiffs towards the dock area, and the boat ran her over. She died from her injuries. Following the plaintiff's death, the speedboat operator was tried and convicted of homicide by imprudence in Cuba. The basis for the conviction was due to exceeding the number of people allowed on the speedboat. The plaintiffs brought this action in Ontario in tort and breach of contract against Sunwing and its partners as well as against the moving parties, who were on the excursion with them.

The moving parties unsuccessfully challenged Ontario's jurisdiction. Justice Joseph Perfetto evaluated whether Ontario had jurisdiction based on the *Van Breda* factors.[19] One such factor was whether the defendant was domiciled or resident in the province. When looking at this first factor, the court decided that there was a real and substantial connection to Ontario, given that the Sunwing defendant's head offices are located in Ontario. Perfetto J also addressed the second factor — whether the defendant carried on business in the province. Evidence clearly supported the connection since the Sunwing defendants carried out business in Ontario. The contract in dispute was made in the province consistent with the fourth factor. Another presumptive factor was based on where the contract was formed that favoured Ontario. There was a real and substantial connection to the jurisdiction.

Turning to *forum conveniens*, Perfetto J underlined that the moving party must do more than just present an alternate jurisdiction.[20] Cuba was not in a better position to dispose of the litigation in a fair and efficient manner. If litigated in Cuba, the plaintiffs would not have available to them certain remedies akin to those in Ontario.[21] Jennifer's

[17]Relying on principles in *Fairhurst v De Beers Canada Inc*, 2012 BCCA 257; *Shah v LG Chem, Ltd*, 2015 ONSC 2628.

[18]Leave to appeal to the Ontario Court of Appeal refused, 2024 ONSC 3047.

[19]*Van Breda*, *supra* note 2 at para 90.

[20]*Ibid* at para 105.

[21]*Family Law Act*, RSO 1990, c F.3 9 (*FLA* ON).

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estate would have no claim in Cuba. While some witnesses were apparently in Cuba, many main witnesses remained in Ontario, including the moving parties. The Sunwing defendants who were subject to the contractual and tort claims also resided in Ontario, not Cuba. The moving parties had no assets in Cuba. There were also steps that could be taken to put the evidence of witnesses in Cuba before the court. The moving parties not only failed to discharge their burden but also, under the circumstances, Ontario was clearly the most appropriate forum.

Jurisdiction — non-resident defendants — patent infringement — attornment — limitation period — jurisdiction not found

JL Energy Transportation Inc. v Alliance Pipeline Limited Partnership, 2024 ABKB 72

JL Energy Transportation granted a limited-use licence over technology used in the storage and extraction of natural gas to the defendants, some based in Calgary and others based in Delaware, United States. JL Energy subsequently brought an action alleging the defendants caused damage and infringed on its patents by using that technology outside the scope of their limited-use licence to transport enriched natural gas. The defendants successfully contested Alberta's jurisdiction to hear allegations of breaches of JL Energy's US patent and claims associated with a US extraction facility. They argued that, under US law, an Alberta court could not address claims related to a US patent. Patents are territorial and must be adjudicated in their issuing country. Neither Canadian nor US patent legislation granted Canadian jurisdiction over JL Energy's US patent claims.[22]

Considering the *Van Breda* factors,[23] Justice Karen Horner concluded that Alberta would never have jurisdiction over the licensing agreement or other contract between the parties that had not expressly attorned to its jurisdiction. The portions of JL Energy's statement of claim relating to the US patents would be outside the jurisdiction of the Court of the King's Bench and had to be struck from the claim per the defendants' position. Any surviving action would be limited to Canadian patent infringement. This part of the action was initially dismissed in its entirety due the expiration of a two-year limitation period, but that finding was dismissed as an error on appeal.[24]

Jurisdiction — non-resident defendant — claim for injury to person or damage to property or reputation — forum selection clause not applicable — jurisdiction found

Masjoody v Momeni, 2024 BCSC 1004[25]

The applicant, X Corporation (X Corp), formerly known as Twitter Incorporated, sought to dismiss Masood Masjoody's claims that it was vicariously liable for allowing

[22] *Patent Act*, RSC 1985, c P-4, s 55.01; see also *TR Technologies Inc*, 2011 ABQB 390 at paras 38, 81.

[23] *Van Breda*, *supra* note 2 at para 90.

[24] *Limitations Act*, RSA 2000, c L-12; *JL Energy Transportation Inc v Alliance Pipeline Limited Partnership*, 2025 ABCA 26.

[25] Affirmed in *X Corp v Masjoody*, 2025 BCCA 89.

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defamatory statements against him. X Corp is a Nevada company with headquarters in San Francisco. Masjoody used X while resident in British Columbia. When signing up to use X, users had to agree to terms of service, which included using X at their own risk as some content may be "offensive, harmful, inaccurate, or otherwise inappropriate." There was a clause stating that X is not liable for any damages from using the app, and there was another forum selection clause that stated that all disputes should be resolved by the courts in San Francisco County under law of the State of California.

Justice Andrew Mayer considered whether the court should enforce a forum selection clause in a consumer contract in this context.[26] The onus was on X Corp to show that the forum selection clause applied to Masjoody's claims. X Corp claimed that the claims were within the broad scope of the forum selection clause. The preamble in the terms stated that they governed the user's access and use of X Corp's services, but those were not the main claims before the court in the case. The issues that Masjoody alleged were not related to his ability to access and use the services through the content posted on X, but, instead, he sustained compensatory damages through the publication of defamatory content on X. The terms and forum selection clause did not stop Masjoody from bringing defamation and conspiracy claims against X Corp in British Columbia. Mayer J also rejected X Corp's reliance on US authorities. X Corp did not meet its onus to show that the forum selection clause applied to this case, and the application to dismiss for want of BC jurisdiction was dismissed.

Jurisdiction — employment — arbitration clause not enforceable

Wiederhold v Aspen Technology, Inc., 2024 BCSC 1731

The plaintiff, David Wiederhold, sued his employer, the defendant Aspentech Canada Corporation (ACC) and its parent company Aspen Technology Incorporated (ATI) headquartered in Bedford, United States, for unpaid bonuses and commissions. He worked for ACC from 2008 to 2020 during which the defendants withdrew an incentive plan and refused to compensate him under the old policy. The defendants argued that this matter should be resolved in Boston, Massachusetts, by way of arbitration.[27] Wiederhold asked the court not to enforce the arbitration clause because he received no fresh consideration, it violated public policy by depriving him of protection under the *Employment Standards Act* (*ESA*)[28] and was unconscionable. Justice Warren Milman of the BC Supreme Court found the arbitration clause unenforceable for want of fresh consideration to support restrictive terms added to an employment contract.[29] The effect of the arbitration, forum selection, and choice-of-law clauses was to circumvent the mandatory provisions of the *ESA*.

Milman J also found the clause unconscionable based on the principles in *Uber Technologies Inc. v Heller*.[30] Even to resolve the preliminary jurisdictional objections would impose disproportionate costs on Wierdhold relative to the size of his claim. Requiring him to challenge jurisdiction as contemplated by the arbitration clause

[26]*Douez v Facebook*, 2017 SCC 33, [2017] 1 SCR 751 at paras 28–29 [*Douez*].
[27]*Arbitration Act*, SBC 2020, c 2, s 7.
[28]RSBC 1996, c 113 [*ESA*].
[29]*Adams v Thinkific Labs Inc*, 024 BCSC 1129; *Matijczak v Homewood Health Inc*, 2021 BCSC 1658.
[30]2020 SCC 16 [*Uber*].

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effectively prevented him from resolving that challenge. The defendants could not be granted a stay in favour of arbitration as the clause they relied on was void and inoperative.

Jurisdiction — forum selection clause enforceable

Cyclesmith v Salesforce.com, 2024 NSSC 306[31]

The defendant, Salesforce.com Canada Corporation, moved for a stay of proceedings claiming that the forum selection clauses contained in its master subscription agreement (MSA) were enforceable against the plaintiff, Cyclesmith Incorporated. The contract stated that the more appropriate forum was Ontario and that Ontario courts had exclusive jurisdiction. This action began after Cyclesmith filed a notice of civil claim that the defendant's cloud-based computer technology failed. Cyclesmith sought relief from Salesforce for losing online sales, money paid for services, and so on. Both companies agreed that Nova Scotia had territorial competence as they were both incorporated in Nova Scotia, but they disagreed over the application of the forum selection clause in favour of Ontario under the circumstances.

Salesforce was a company incorporated in Delaware with physical offices in Toronto, Montreal, and Vancouver. All of Salesforce's Halifax, Nova Scotia, employees worked remotely. Cyclesmith was a small Nova Scotia business with two retail locations in Halifax and Dartmouth. Cyclesmith had a small online presence, which they wished to expand, so they contracted with Salesforce. Salesforce wanted the Ontario Superior Court in Toronto to have exclusive jurisdiction over the claim under the forum selection clause. The court found the forum selection clause sufficiently clear and without ambiguity. Cyclesmith relied on *Uber* to compare the discrepancy in bargaining power to the current case.[32] In this case, however, Justice Darlene Jamieson did not find the arbitration clause unconscionable, as in *Uber*, since there was no evidence that Cyclesmith could not protect its interests. Cyclesmith was not dependent on, or had any necessity to choose to work with, Salesforce. The evidence showed that Cyclesmith solicited proposals, weighed them, had options with other providers than Salesforce, and had various discussions. The terms of the clause were not the result of unequal bargaining power.

Cyclesmith was also unable to argue that they were not a sophisticated party. The contract was not forced upon them. The price was discussed, feedback was provided, and the parties negotiated. The parties entered into a commercial contract after Cyclesmith sought out Salesforce. Cyclesmith was therefore capable of protecting its own interests. Cyclesmith further argued that there were exceptional circumstances requiring a departure from the valid contract since Salesforce hid the MSA and, therefore, the forum selection clause. If litigated in Toronto, Cyclesmith argued it might be deprived of its claim due to the cost involved in proceedings there. Cyclesmith believed that Salesforce went to lengths to hide the forum selection clause. The judge disagreed with Cyclesmith because the forum clause was referenced six times in the two contracts. Cyclesmith had not met its burden of showing why the court should disregard the forum selection clauses that were otherwise valid and enforceable.

[31] Affirmed in 2025 ONCA 298.

[32] *Uber*, *supra* note 30.

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ii. Class actions

Jurisdiction — class proceedings — securities - disclosure requirements

Shirodkar v Coinbase Global, Inc. et al., 2024 ONSC 1399[33]

The plaintiff brought this putative class action claiming that the defendants contravened the *Securities Act*[34] by not complying with disclosure requirements linked to their sale of cryptocurrency on the online platform, Coinbase. The four related defendants challenged Ontario's jurisdiction and sought to stay the action based on *forum non conveniens.* In October 2017, the plaintiff created an account on Coinbase. The plaintiff lived in France when the account was originally created but later relocated to Ontario. When opening the account, the plaintiff accepted a user agreement, which provided that the contract was governed by English law and provided for the non-exclusive jurisdiction of the English courts. In November 2020, another user agreement provided the plaintiff with digital currency wallets and digital currency exchange services, allowing the plaintiff to purchase and sell digital currencies. This agreement was governed by the laws of Ireland and gave non-exclusive jurisdiction to the Irish courts. Two days later, the plaintiff accepted yet another user agreement, which provided that the law of England and Wales would govern the parties' relationship.

The plaintiff asserted jurisdiction *simpliciter* on three bases: presence, consent, and assumed jurisdiction. On presence-based jurisdiction, the plaintiff argued that "carrying on business" should adapt to the realities of online business and that a physical office or presence in a jurisdiction was not required. Justice Jasmine Akbarali of the Ontario Superior Court highlighted relevant factors in finding a defendant carrying on business in a jurisdiction, including registration as an extra-provincial corporation or obtaining a licence of registration from a regulator to undertake a particular business activity within the jurisdiction.[35] Akbarali J considered Coinbase Europe, Coinbase Global, Coinbase Canada, and Coinbase Incorporated separately. Coinbase Europe's activities in Ontario were virtual only and passive. This was not sufficient to meet the *Van Breda* requirements of carrying on business in Ontario. Coinbase Global, a publicly traded company in Delaware, also never carried on business in Canada. Though it was registered with FINTRAC, that factor alone was insufficient. Similarly, Coinbase Incorporated did not carry on business in Ontario. While Coinbase Incorporated was registered under the *Extra-Provincial Corporations Act*[36] and with FINTRAC, it had no physical presence in Ontario, and there was no evidence of targeted advertising or data collection in Ontario. Akbarali J placed greater weight on evidence that Coinbase Incorporated operated the Coinbase Platform outside of Ontario.

By contrast, Coinbase Canada was incorporated under the laws of British Columbia. Coinbase Canada believed that it was carrying on business in Ontario as of

[33]Recently affirmed in 2025 ONCA 298.

[34]RSO 1990, c S.5 [*Securities Act*].

[35]*Van Breda*, *supra* note 2; *HMB Holdings Ltd v Antingua and Barbuda*, 2021 SCC 44; *Rieder v Plista GMBH*, 2021 ONSC 4458 at paras 21, 26; *Turner v Bell Mobility* Inc, 2014 ABQB 36 at paras 47–4-8; *Vale Canada Limited v Royal and Sun Alliance*, 2022 ONCA 862; *EM Technologies Inc et al*, 2013 ONSC 5849 at para 15.

[36]RSO 1990, c E 27, s 1(3).

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December 2020 and filed an initial return with the Ontario Ministry of Government Services. Coinbase Canada employed about 150–200 people in Canada, including Ontario, and had key members who carried out duties in Ontario. Coinbase Canada conducted business in Ontario when the claim commenced sufficiently for the plaintiff to establish presence-based jurisdiction. In considering consent-based jurisdiction, the court focused on the Canadian user agreement referring "to Coinbase Canada and all affiliated and other group companies of those companies (including Coinbase Inc)." The plaintiff argued that the Canadian user agreement adopted the jurisdiction of Ontario courts retroactively and that the defendants had consented to the court's jurisdiction. The defendants contended that the wording of the forum selection clause made clear that it was including Coinbase Canada. Akbarali J agreed with the defendant that the language around the user agreement on retroactivity was specific, finding that Ontario did not have consent-based jurisdiction. The court rejected the plaintiffs' argument that, in dealing with Canadian securities regulators, the Coinbase defendants submitted to the jurisdiction of Ontario.

The court turned to the *Van Breda* factors of a real and substantial connection, examining any business carried out in Ontario or whether a tort was committed in Ontario.[37] It was clear from the presence-based jurisdiction analysis that neither Coinbase Europe, Coinbase Incorporated, or Coinbase Global carried out business in Ontario. The plaintiff alleged that the tort was committed in Ontario because Ontario was the jurisdiction affected by the trading on the Coinbase platform and where the plaintiff lived. While the plaintiff could argue that Ontario was a jurisdiction substantially affected by the defendants' conduct, this was a weak connecting factor. Ontario was a jurisdiction affected by the Coinbase platform in the same way as any number of jurisdictions. For these reasons, Akbarali J found that there was no basis to assume jurisdiction over Coinbase Europe, Coinbase Global, or Coinbase Incorporated and dismissed the plaintiff's action against those companies.

The Ontario Superior Court still had jurisdiction over the action against Coinbase Canada, but Akbarali J declined to exercise it based on the doctrine of *forum non conveniens*. The plaintiff only traded in digital assets, and nothing was physically traded within Canada while using the platform. Despite the business being in Ontario, this was unconnected to the plaintiff's claim arising before Coinbase was located in Canada. The outcome might differ if Coinbase Canada were a counterpart to the user agreement, but that was not the case. The absence of a class actions framework in Ireland was also not a sufficient loss of juridical advantage as comity required deference, even to jurisdictions with no class proceedings.[38] Akbarali J permanently stayed the action against Coinbase Canada as Ireland was clearly the more appropriate forum.

Jurisdiction — class proceedings — consumer protection

Ware v Airbnb, Inc., 2024 BCSC 2240

This class proceeding was brought by the plaintiff, Margot Ware, against AirBnB Incorporated and their related entities on behalf of consumers who paid a commission or fee to use their services to rent accommodation for leisure and vacation

[37] *Van Breda*, *supra* note 2 at para 90.
[38] *Leon v Volkswagen AG*, 2018 ONSC 4265, 375 DLR (4th 418) at para 44.

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travel.[39] The defendants comprised various AirBNB entities (collectively know as the AirBnB defendants). Some of these defendants unsuccessfully challenged the court's territorial competence.[40] Justice Elizabeth McDonald found a real and substantial connection to British Columbia that could not be rebutted. Among various presumptive connecting factors, the plaintiff established the interpretation of a contract for property located in British Columbia, restitutionary obligations substantially arising in British Columbia, and a tort committed in British Columbia in breach of consumer protection legislation.

The contested AirBnB entities were also unable to demonstrate that California was clearly the more appropriate forum.[41] They sought a stay on *forum conveniens* grounds claiming that the forum selection, arbitration, and class action waiver clauses found in their terms of service should be enforced. The plaintiff, however, disputed that those terms amounted to a forum selection clause for the non-Canadian resident subclass as jurisdiction was "non-exclusive" and should not be enforced given the principles in *Douez v Facebook*.[42] McDonald J found that the contested AirBnB entities offered no meaningful evidence to assist in understanding the alleged inconvenience and expense associated with forcing its web-based business to litigate in British Columbia. There was also no evidence of duplicative proceedings in California. McDonald J further rejected the defendants' claim that the terms of service must be interpreted under California and American law since the claim was about violations of Canadian real estate and travel agency laws.

iii. Family

Validity of the marriage — divorce granted without the presence of one spouse — same-sex marriage

HYC v MKH, 2024 BCSC 1942

The applicant, HYC, applied for a divorce as a same-sex couple.[43] The main issue was "whether the applicant had met the statutory requirements for an application for divorce by one spouse, without the consent of the second spouse, where the marriage is between two persons of the same sex who reside in a state that does not recognize the validity of the marriage."[44] The other party was living in Hong Kong. The two were married in British Columbia in 2013, and the parties habitually resided in Hong Kong during their marriage. The applicant had resided in Hong Kong since 1998. Hong Kong does not recognize same-sex marriage.

There was a discrepancy between the relevant statutory provisions in the *Civil Marriage Act* (*CMA*) and the *British Columbia Supreme Court Family Rules* (*SCFR*)[45] and the related Form F1.1, which provides the framework for non-consent divorce in

[39]Application for certification under the *Class Proceedings Act*, RSBC 1996, c 50.

[40]*Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28, s 3(3) [*CJPTA*]; *Van Breda*, *supra* note 2 at para 41.

[41]*CJPTA*, *supra* note 40, s 11.

[42]*Douez*, *supra* note 26 at para 35.

[43]*Civil Marriage Act*, SC 2005, c 33, Part II (*CMA*).

[44]*Ibid.*

[45]*CMA*, *supra* note 43; BC Reg. 169/2009, rule 2-2.1 [*SCFR*].

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British Columbia. Under the *SCFR*, divorce by one spouse in the absence of another spouse requires the applicant to file an order in the court where one of the spouses resides. It was impossible for the applicant to obtain an order from Hong Kong where the validity of the marriage was not recognized.

The issue was whether the *SCFR* limited the court's authority to grant a divorce under the *CMA*. Justice David Jones found the discrepancy between the two did not prohibit the court from granting a no-consent divorce for a number of reasons. First, the language of Rule 2-2.1(2) lists the documents that the applicant "may" file. There is nothing mandatory in what the applicant must file, but, rather, the court was provided the authority to grant a divorce. Second, the objective of the *SCFR* under Rule 1-3(1)(b) is to "secure the just, speedy and inexpensive determination of every family law case on its merits."[46] Determining the merits of a divorce application required the court to consider if the application meets the statutory requirements of obtaining a divorce, and prohibiting someone from demonstrating that they have met those requirements would frustrate this process. Third, the court should favour harmonious interpretation of federal and provincial legislation, which, in this case, was between the *CMA* and the *SCFR*. Finally, the purpose of why the *CMA* was introduced is important as it extended the availability of marriage, as well as divorce, to same-sex couples. Under the *CMA*, the court had the authority to grant divorce without one of the spouses.[47] Jones J found that the other spouse, MKH, unreasonably withheld consent to the application of divorce, and, therefore, under the *CMA*, these spouses could be divorced.

Child wrongfully removed — Hague Convention on Child Abduction — *habitual residence*

Thomas v Thomas, 2024 ONCA 646

Mr. Thomas successfully appealed the dismissal of his application under the *Hague Convention on Child Abduction*.[48] The appellant was a US citizen residing in Balch Springs, Texas, in the United States. The respondent, however, was a Canadian citizen residing in Toronto and currently unemployed. The parties met online, were married in New York, and then returned to Ontario and Texas. In July 2020, they became pregnant with their child, and the parties returned to Ontario to live together from September to November 2020. The appellant went to Texas in December 2020 while the respondent remained in Ontario until July 2021. Their child was born in 2021 in Toronto and, thus, had dual American and Canadian citizenship. The parties' marriage began to break down, and the respondent returned to Ontario again with the child without notifying the appellant of her intentions.

The application judge found based on extensive evidence in text messages that the appellant had unequivocally acquiesced to the child's relocation to Toronto. On appeal, the court found that the trial judge correctly cited the legal principles but failed to properly apply them.[49] The child's habitual residence was in Texas, and the child was removed from his habitual residence without the appellant's consent or

[46] *SCFR*, *supra* note 45.

[47] *CMA*, *supra* note 43, s 7(1).

[48] *Hague Convention on the Civil Aspects of International Child Abduction*, 25 October 1980, Can TS 1983 No 35, art 13(a) [*Hague Convention on Child Abduction*].

[49] *Ibid*; *Ibrahim v Girgis*, 2008 ONCA 291 DLR (4th) 130; *Jackson v Graczuk*, 2007 ONCA 388, 283 DLR (4th) 755; *Katsigiannis v Kottick-Katsigiannis*, (2001) 283 DLR (4th) 386 (Ont CA).

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knowledge. The trial judge stated that the appellant had acquiesced because there was nowhere in writing that the appellant explicitly stated that he did not consent to the child's removal. There were two problems with this finding since there was a contradiction that the father could consent but did not have to do so explicitly. There was also a reverse burden of proof that the abducting parent must prove consent or acquiescence. The application judge put considerable weight on the text when the appellant told the respondent to "just come home." To conclude that he did not include the child was problematic. The appeal was allowed, ordering the return of the child to his habitual residence in Texas.

Child abduction — habitual residence — procedural fairness

Zafar v Azeem, 2024 ONCA 15

The appellant mother brought an application to have her child declared habitually resident in Ontario and to grant her a parenting order to have sole decision-making responsibility and primary residence for the child. The respondent father made an urgent motion since he had already commenced an action for related relief in Pakistan. The parents were both born and married in Pakistan. At the time of their marriage, the father was living in Mississauga as a permanent resident of Canada and the mother was living in Pakistan. Later, she moved to Canada and worked remotely. The child was born in Canada and was a Canadian citizen with a Canadian passport. In November 2021, the mother took the child to Pakistan to visit her parents. The father provided a signed travel consent, permitting the trip, and the mother and child left on a one-way ticket. According to the mother, the father planned to eventually join them in Pakistan and then travel back to Canada together. The mother ended up staying in Pakistan from November 2021 to January 2023. She obtained employment in Pakistan in 2022, and, while it was her intention to return to Canada, the father would not purchase plane tickets for their return. The father travelled to Pakistan from May until July 2022, but the mother was unaware until he was in the country. While the father was in Pakistan, he exchanged messages with the mother about wishing to divorce, and, in December 2022, the divorce deed was registered in Pakistan. The divorce notice was sent out, but the mother claimed that she had never received it. The father had an ongoing proceeding in Pakistan, which the mother did not appear for, and the mother launched these proceedings in Ontario.

The father succeeded in his application before a motion's judge to have the child returned to Pakistan.[50] On appeal, the mother argued that she was denied procedural fairness in the rush judgment and the motion judge's failure to properly consider whether the child was habitually resident in Pakistan or Ontario and whether, if returned to Pakistan, the child would be at risk of serious harm.[51] The court agreed that there was a breach of procedural fairness given the lack of cross-examinations. Despite the need for urgency, it was also important in abduction cases to involve a careful assessment of the factual circumstances. The motion judge found on affidavit evidence without making any credibility findings that the child was habitually resident in Pakistan and declined jurisdiction under the *Children's Law Reform Act* (*CLRA*).[52] Given conflicting affidavit evidence, the motion judge could not assess

[50]*Children's Law Reform Act*, RSO 1990, c C 12 [*CLRA*].
[51]*Ibid*, ss 22, 23, 40.
[52]*Ibid*, s 22.

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credibility. The fact that the child had Canadian citizenship and an Ontario health card also did not determine habitual residence. The analysis overlooked that the child was in Canada for longer than she was in Pakistan and the intention among the parties that gave rise to the trip in the first place. One thing that was not in dispute was that the mother was the child's primary caregiver. Determining parental intent was key to determining habitual residence. If the mother's evidence was accepted, this would mean the child's habitual residence is in Ontario and not Pakistan.

Even if the motion judge was right and Pakistan was the child's habitual residence, the court found that there should have been a more robust evidentiary hearing to fairly consider whether the mother had met her onus of showing serious risk of harm if the child was returned.[53] The mother provided examples of abuse throughout their relationship and the child's life. Despite this evidence, the motion judge rejected the evidence that these allegations could harm the child seriously. The last issue was the validity of the foreign divorce. The mother contended that, because she was not a habitual resident of Pakistan, the divorce could not be recognized, and the divorce was not given with enough evidence. The court disagreed with the motion judges' conclusion that the mother was a habitual resident of Pakistan, contrary to her evidence. The appeal was allowed.

Child abduction — Hague Convention on Child Abduction — *informed consent or acquiescence provided*

Ahmed v Adbelmoaein, 2024 ONSC 4735

The applicant father unsuccessfully brought this motion to have the parties' four-year-old child returned to London, United Kingdom.[54] The parties were married in Cairo, Egypt, in 2016. The mother was an Egyptian national, and the father was a British national with Egyptian citizenship. The parties began immigrating to Canada prior to the birth of their child in London in 2019. They booked round-trip flights to Canada and received permanent resident cards and their permanent resident status when they arrived. The mother wished to remain in Canada while awaiting the visa process, but the father objected and returned to the United Kingdom alone.

The father maintained that the child's life was in the United Kingdom as she was signed up for preschool, had a support system, her family doctors were there, and the father had a home and job there. Relying on an exception in the *Hague Convention on Child Abduction*[55] related to the father's consent to removal, the mother claimed that her child's residence was in Canada as the mother was not a UK citizen and was reliant on the father for citizenship. She claimed that the move to Canada was anticipated and planned, and, with the father's job, he could work anywhere. The child had adjusted to life in Canada, was attending school, and had registered for school camps.

Justice Ariana Doyle examined the evidence of the party's citizenship and identification and their connections to the United Kingdom and Canada. Given the lack of time between the child's change of residence to Canada from the United Kingdom,

[53] *Ibid*, s 23.
[54] *Hague Convention on Child Abduction*, *supra* note 48.
[55] *Ibid*, s 13(a).

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the child's habitual residence was found to be the United Kingdom.[56] Doyle J then considered whether the court should nonetheless exercise discretion to return the child to the United Kingdom or if an exception was present as the mother alleged. To determine consent, it was a high bar to meet as the father's consent or acquiescence must be clear and cogent. The parties had discussions and planned to come to Canada. There was no evidence that the father was unaware of the immigration process. He completed paperwork, participated and cooperated in the permanent residence application, signed the confirmation of permanent residence document in front of an Immigration, Refugees and Citizenship Canada (IRCC) officer in Toronto, and applied for his Ontario identification card. Even though the plane ticket had a return date, there was still flexibility. The father took online jobs and a home near the child's school. The father discussed the process, understood the process, and took concrete steps to complete the requirements, acquiescing to relocate the child. The exception applied with the father having consented to the child remaining in Canada.[57]

iv. Anti-suit injunctions

Restraining litigation in a foreign court and arbitration proceedings — injunction application adjourned

Axion Ventures Inc v Bonner, 2024 BCSC 45

The plaintiffs in three separate actions sought an order restraining NextPlay Technologies Incorporated from pursuing what they claimed were abusive and duplicitous litigation in the US District Court for the Western District of Washington. One of the plaintiffs, Axion Interactive Incorporated, also sought a separate injunction against related arbitration proceedings commenced in Thailand. NextPlay took the position that, before seeking an anti-suit injunction in British Columbia, the plaintiffs were required to first bring stay applications in the Washington action and the Thailand arbitration. Justice John Walker considered the reasoning in *Amchem Products Inc v British Columbia (Workers' Compensation Board)*[58] that, given the aggressive nature of the remedy, it was preferable that the party seeking it bring the application in the foreign court first out of respect and comity.[59]

NextPlay also pointed to decisions that framed this as an absolute requirement absent special circumstances.[60] The plaintiffs disagreed that this amounted to an absolute requirement, emphasizing that it was merely preferable.[61] Walker J nonetheless concluded that the distinction between an absolute requirement as opposed to a preferable one had not been ruled on by a BC appellate court. He agreed that *Amchen* remained the leading case and was bound by the "express cautionary

[56]*Children's Lawyer v Balev*, 2018 SCC 16, [2018] SCR 398.

[57]*Hague Convention on Child Abduction*, *supra* note 48, s 13 (a).

[58][1993] 1 SCR 897, [1993] 3 WWR 441 [*Amchen*].

[59]*Ibid* at 912–13.

[60]*McMillan v McMillan*, 2012 BCSC 32; *RPC Inc v Fournell*, 2003 BCSC 917, aff'd 2004 BCCA 30; *Quigg v Quigg*, 2018 BCSC 853. Interpreted more recently by McHaffie J in *Seismotech Safety Systems Inc v Forootan*, 2021 FC 773 (characterizing as definitive law in British Columbia).

[61]*Amchen*, *supra* note 58.

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language" in hearing an anti-suit injunction without a preceding stay application in the foreign jurisdiction. While the plaintiffs had attempted to follow the general rule in *Amchen* and were respectful of comity, it would have been helpful to have the reasons from the Washington District Court on *forum conveniens*.

In applying the *Amchen* test, Walker J lacked sufficient means to determine the nature and scope of the claims under the *Copyright Act*,[62] *Racketeer Influenced and Corrupt Organizations Act*,[63] and the *National Stolen Property Act*[64] to satisfy the first part of the test. He was equally unable to satisfy the second part of the test because he was unable to determine any loss of juridical advantage. He adjourned the application for an injunction pending a determination by the Washington court on the merits of a stay application because it would be helpful to consider in an analysis. When it came to the injunction against the Thailand arbitration, Walker J considered the principles from *Li v Rao*.[65] He nonetheless found that an injunction was not necessary at this juncture because the Thai Arbitration Institute had already stayed the arbitration pending findings in the related action.

v. Real Property

Jurisdiction — contract for the sale of land — jurisdiction declined

Wilson v Martin, 2024 NSSC 321

These proceedings involved a dispute over a contract for the purchase of property in Ecuador. The plaintiffs claimed that the court in Nova Scotia had jurisdiction, while the defendants submitted that Ecuador was the preferable forum. Justice Ann E. Smith found that the Nova Scotia Superior Court had territorial jurisdiction based on residency. All parties were living in Nova Scotia allowing the issues to be heard there. The decision nonetheless turned on a *forum conveniens* analysis of Ecuador as a more convenient forum.[66] Looking at relevant circumstances, Smith J found that all parties were located in Nova Scotia and would have to travel for a trial in Ecuador, but all of the witnesses were present in Ecuador and would have to testify remotely with interpretation. All documents would also have to be translated. Any claims regarding safety were unsubstantiated. The plaintiff's chose to live in Ecuador voluntarily without any complaints of danger. The degree of expense and inconvenience in having to translate the documents or travel did not weigh in favour or against either jurisdiction. The applicable law weighed in favour of the alternative forum of Ecuador. The risk of conflicting decisions in different courts also weighed in favour of Ecuador as the defendants had already commenced a proceeding in Ecuador related to the property transaction.

Next, it was found that enforcing a judgment from Ecuador would be difficult given that Ecuador was not a party to the *Hague Convention on Enforcement of Civil Judgements*.[67] This factor weighed in favour of Nova Scotia as the more appropriate

[62]17 USC §§ 101–22 (1976).
[63]18 USC 96.
[64]18 USC 113.
[65]2018 BCSC 47, aff'd 2019 BCCA 264.
[66]*CJPTA*, *supra* note 40, s 12.
[67]*Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, 2 July 2019, [2019] OJ L187 (entered into force 1 September 2023).

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forum. Finally, Smith J found neither party's comments clearly spoke to the fair and efficient working of the Canadian legal system as opposed to the convenience of the parties. There was an element of forum shopping by the plaintiff's insistence on litigating in Nova Scotia and, therefore, favouring an alternative forum. Ecuador was the more appropriate forum, and, even though Nova Scotia's jurisdiction had been established, the proceeding was more closely connected to Ecuador.

Jurisdiction — contract for the sale of property — jurisdiction found and not declined

Yegre EB Ltd. v Seguin, 2024 BCCA 365

The appeal concerns a purchase agreement with the respondents for the sale of five industrial properties, two located in British Columbia and three in Ontario. In the purchase agreement, there was a forum selection clause that the parties should submit to the jurisdiction of the Alberta courts. The chambers judge determined that the clause was valid and enforceable and assigned exclusive jurisdiction to the Alberta courts. The appellants argued that the chambers judge erred in law in her interpretation of the clause. The appellant sought damages relating to the purchases of the property for breach of contract, fraudulent, and negligent misrepresentation and conspiracy.

The appellant argued that the chambers judge erred in law in failing to interpret the clause by reference to objective surrounding circumstances and instead looking only to what other cases have said about similar language in the past. It was not an error to look at judicial precedents that have discussed and interpreted similar contractual language and the chambers judge reviewed the factual circumstances while relying on case law. Any surrounding circumstances that were allegedly overlooked did not favour one interpretation over another.

The chambers judge did however err in interpreting the case law as recognizing a distinction between "attorn" and "submit." Applying *Old North State Brewing Co. v Newlands Services Inc.*,[68] the court found that, because the word "submit" was used rather than "attorn," there was a limiting reference to attornment, suggesting that the parties intended for the clause to confer exclusive jurisdiction. It is not apparent from *Old North* that the court attached any particular significance to the term "attorn" or "submit." The result of using these two words was the same: it was an agreement to "submit" or "attorn" to a court's jurisdiction without more and was interpreted to signal non-exclusivity. These words have also been used interchangeably throughout the case law.

Turning to whether there was an exclusive jurisdiction clause, the court found that the parties' agreement to submit to the jurisdiction of Alberta did not show an intention of exclusive jurisdiction. There were many interpretations presented by the parties that created some ambiguity, but the surrounding circumstances did not resolve this ambiguity. The burden was on the respondents to show that the clause clearly demonstrated the intent to adjudicate in the Alberta courts. The clause could be interpreted in two ways, including the clause as intending non-exclusive jurisdiction. The respondents had not discharged their burden to show the exclusive jurisdiction of the Alberta courts.

[68] *Old North State Brewing Co v Newlands Services Inc*, (1998) 58 BCLR (3d) 144 [*Old North*].

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The court determined if British Columbia should nonetheless decline to exercise that jurisdiction as a *forum non conveniens*. It was feasible and in the interest of jurisdiction to determine whether Alberta was a more appropriate forum on appeal rather than remitting the issue back to the Supreme Court. The clause could weigh in favour of British Columbia or Alberta. It did not state a preference for Alberta, but it confirmed that the parties did not object to jurisdiction being commenced in the Alberta courts. The respondents did not discharge their burden in demonstrating that Alberta was a more appropriate forum. There was no reason to disrupt the proceeding in British Columbia.

vi. Estate proceedings

Jurisdiction — distribution of estate — claim for misappropriation of funds

Raj v Jeet, 2024 BCSC 83

This action involved the distribution of funds from the estate of Lakshman Kissun, who died intestate in 2011 with property in Fiji. Kissun had four daughters and one son. Following Kissun's death, his son was made the administrator of the estate, but he also passed away in 2019, leaving a spouse and three children. Following the brother's death, the plaintiff, Urmilla Singh, and the defendant, Sashi Jeet, went to Fiji for his funeral. While in Fiji, Singh and Jeet went to a lawyer's office and decided that Jeet would become the administratrix of the estate. Jeet was chosen because she was the oldest sister and travelled to Fiji regularly. The other sisters signed the required paperwork for Jeet to become the administratrix.

The property owned by Kissun was sold in April 2020 for Fiji $450,000. Following the home sale, the sisters met up in Surrey with the brothers' widow on a video call to decide how to divide the proceeds. They agreed that Jeet would get Fiji $114,000 and the other four beneficiaries would each get Fiji $74,000. Jeet received more to recognize her work as the administratrix. The lawyer sent an email with this agreement written on these terms, but Jeet initially denied that such an agreement existed. Following the subsequent agreement and the sending of funds, there was some back and forth between Jeet, Singh, and the lawyer regarding the allocation of funds. Jeet ended up receiving a total of just over Fiji $95,000. There were discussions about forged documents and sending money to different businesses, but Justice Peter Edelmann did not find this credible and did not accept Jeet's narrative. He concluded that the sole reason Jeet would lie about not receiving her sisters' portions of the estate in Canada through two wire transfers was because she was not acting in her role as administratrix when she misappropriated the funds.

Given that the estate was located in Fiji, Edelmann J questioned whether British Columbia was a competent forum. Despite its territorial competence, British Columbia could decline to exercise it in favour of Fiji as a clearly more appropriate forum.[69] There was a clear and compelling basis for the matter to be decided in British Columbia, given all the parties were residents of British Columbia and the funds issues were transferred to British Columbia.[70] Edelmann J found that Jeet had a

[69]*CJPTA*, *supra* note 40, s 11; *Van Breda*, *supra* note 2.

[70]Distinguishing *McLeod v McLeod*, 2011 BCSC 194; *Morrison v Morrison*, 2021 BCSC 2523.

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fiduciary duty to her sisters when she misappropriated their share of the father's estate. Jeet was found to have misappropriated Fiji $148,000, which was supposed to be transferred to her sisters but which she had instead transferred to herself.

B. Québec

Compétence — arbitrage — article 2638 CcQ, article 622 CcP

Globeair Holding GMbH c Pratt & Whitney Canada Corp, 2024 QCCS 2451[71]

This was an application by the defendant (Pratt & Whitney) to dismiss the plaintiffs' claim relating to manufacturing defects and refer the matter to arbitration governed by Ontario law and under the auspices of the International Chamber of Commerce in Toronto. The plaintiffs, Globeair Holding GmbH and its subsidiary GlobeAir Ag, are the leading European providers of private on-demand jet charter flights based in Austria. The defendant services the engines of the plaintiffs' aircraft under an exclusive agreement and is based in Longueuil, Quebec. The plaintiffs argued that their claims were based on Article 3128 of the *Civil Code of Quebec*[72] and were not in any way connected to the agreement. The defendants insisted, however, that the claims were intimately connected to their agreement that is governed instead by Ontario law.[73]

Justice Babak Barin found that the use of the words "arising out of or in connection with" signalled the broadest possible grant of jurisdiction to an arbitral tribunal, including for that tribunal to address questions of contract, tort, and so on. Such words necessitated that the Superior Court refer to arbitration the plaintiffs' claims linked to manufacturing defects. If the sophisticated parties in this case intended to exclude certain disputes from arbitration, they would have readily been able to do so in writing.[74] The parties could bring these arguments before an arbitrator and argue the application of either Ontario or Quebec law.

3. Foreign judgments / Jugements étrangers

A. Common law and federal

i. Conditions for recognition or enforcement

Recognition or enforcement — state immunity exception - victims of terrorist attack

Akins v Islamic Republic of Iran, 2024 ONSC 337

The plaintiffs sought to enforce a default judgment from the US District Court of Columbia against the defendants, the Islamic Republic of Iran and its Islamic

[71]Leave to appeal to CA refused, 2021 QCCA 1329.

[72]CcQ 1991 [*CcQ*].

[73]General principles on arbitration in Quebec law. *Desputeaux c Editions Chouette (1987) Inc*, 2003 SCC 178; *Dell Computer Corporation c Union des consommateurs*, 2007 SCC 34.

[74]*Quebec Inc (Restaurant Baton Rougbe) v Allianz Global Risks US Insurance Company*, 2021 QCCA 1594 at para 13; *Uniprix Inc v Gestion Gosselin et Berube Inc*, 2017 SCC 43 at paras 34–37; *Air liquid Canada Inc c Bombardier Inc*, 2010 QCCA 1631.

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Revolutionary Guard (IRGC). The US judgment found them liable for injuries suffered by the plaintiffs in a 1996 Khobar Towers truck bombing in Dhahran, Saudi Arabia, which resulted in the death of a number of American service members.[75] Justice Lisa Brownstone of the Ontario Superior Court granted the request for enforcement based on an exception to sovereign immunity created by the *Justice for Victims of Terrorism Act* (*JVTA*)[76] and the *State Immunity Act*,[77] allowing victims of terrorism to sue terrorists and foreign states that have contributed to terrorism or sponsored a terrorist attack. Interesting for the interaction between public and private international law, Canada's legislation in this area and the terrorist exception to state immunity is now also being challenged by Iran at the International Court of Justice due to the implications of cases such as this one.[78]

Brownstone J determined that the foreign court had properly exercised jurisdiction.[79] The US District Court found that it had subject matter jurisdiction over the claim given the exception to sovereign immunity in the US *Foreign Sovereign Immunity Act*.[80] To fall within this exception, the plaintiffs had to prove that (1) the foreign country was designated a state sponsor of terrorism at the time of the act; (2) the claimants were nationals of the United States at the time; (3) if the act occurred in the foreign state against which the claim had been brought, the claimant must have afforded the foreign state a reasonable opportunity to arbitrate the claim; and (4) the claimant must seek monetary damages for personal injury or death caused by torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if it was engaged in by an official, employee, or agent of a foreign country.[81] The US court found that the plaintiffs had satisfied all four elements, pointing to Iran's state sponsorship of terrorism since 1984 and the role of IRGC, the claimants status as US citizens, and the fact that the bombing was an extrajudicial killing for which the defendants provided material support.[82] The defendants did not have the benefit of sovereign immunity. For Brownstone J, the US court's conclusion was supported by the expert evidence and reflected a real and substantial connection between the subject matter of the action, the wrongdoing, the defendants, and the territory where the action was brought.[83]

Brownstone J also found that the judgment was final and conclusive. It ended litigation of the merits of the dispute, and, though subject to appeal, the time frame for launching any appeal had already expired. There was no evidence of fraud, denial of natural justice, or violation against public policy that would provide a defence against enforcement. The US judgment further satisfied certain conditions for recognition and enforcement under the *JVTA*.[84] First, the bombing occurred in 1996 during the

[75]Under the US *Foreign Sovereign Immunity Act*, 1976, 28 USC 97, Title 28 [*FSIA*].

[76]SC 2012, c 1 (*JVTA*).

[77]RSC 1985, c S-18 (*SIA*).

[78]*Alleged Violations of State Immunities (Islamic Republic of Iran v Canada)*, Application Instituting Proceedings (27 June 2023) (a prior attempt by Iran to bring a case against the United States on comparable US legislation was rejected by the International Court of Justice on jurisdictional grounds).

[79]*Elekta Ltd v Rodkin*, 2012 ONSC 2062; *Dish v Shava*, 2018 ONSC 2867.

[80]*FSIA*, *supra* note 75.

[81]*Akins v Islamic Republic of Iran* (2021), 548 F Supp 3d 204 (US Dist Ct).

[82]*Ibid.*

[83]*Morguard Investments Ltd v DeSavoye*, [1990] 3 SCR 1077 at 1104–09.

[84]*JVTA*, *supra* note 76, s 4(5).

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required time period. Next, the danger was punishable under the terrorist definition of the *Criminal Code*.[85] Finally, both defendants were captured by the *JVTA* as the IRGC had committed the acts for the benefit, or in relation to, Iran.[86]

ii. Defences to recognition or enforcement

Registration — defences to recognition or enforcement — natural justice — filing fee

Arslan v Yapi ve Kredi Bankasi Anonim Sirketi, 2024 SKCA 68[87]

This unsuccessful appeal involved a decision by the Saskatchewan Court of the King's Bench to recognize and enforce a judgment obtained by Yapi ve Kredi Bankasi Anonim Sirketi (YKBank) in a Turkish commercial court against Huseyin Arslan (the appellant). The appellant argued that the Saskatchewan chamber judge had erred in his interpretation and application of the *Enforcement of Foreign Judgments Act* (*EFJA*).[88] The Court of Appeal for Saskatchewan found no error in the conclusion of the chamber judge that the Turkish appeal process met the minimum standards of procedural fairness and natural justice under the *EFJA*.[89] Arslan argued that the requirement of a filing fee for appeal exceeding one million Canadian dollars and that the Turkish courts' refusal to grant a fee waiver denied him access to justice. When he was unable to pay the filing fee, his appeal was dismissed. The court of appeal distinguished the access-to-justice issues raised in *Trial Lawyers Association of British Columbia (Attorney General)*[90] since they arose in a very different context involving court fees in violation of the Constitution. The court acknowledged that, while court fees themselves did not offend natural justice, they can be burdensome in some cases. Proof of this burden did not, however, in and of itself mean that the minimum standards of fundamental justice in this context had not been met. While the filing fee was high relative to the Canadian standard, judging the court's own procedures was not the issue. In this case, Arslan failed to meet his burden of proof that there was unfairness in the Turkish proceedings. The chamber judge was required to respect the Turkish court's own decisions and procedures.

The court of appeal also found that it was not an error to compare the Turkish appeal filing fees to the Saskatchewan regime for security for costs. Arslan mischaracterized the chamber judge's comparison. The chamber judge did not conclude that the Turkish regime substantively paralleled the concept of security for costs in Canada. It was open to the judge to consider whether anything like the Turkish filing fees existed in Canadian law as an example to determine whether the foreign process operated in a manner inconsistent with the notions of natural justice.

Arslan claimed that the chamber judge had erred in finding that he was solvent. According to the court of appeal, however, there was no reason for the chamber judge to inquire into the accuracy of the Turkish court's finding. That was a finding of fact

[85]RSC 1985, c C-46, s 83.02.
[86]*JVTA*, *supra* note 76, s 4(5); *Criminal Code*, RSC 1985, c C-46.
[87]Leave to appeal to SCC refused, 41456 (17 April 2025).
[88]SS 2005, c E-9.121 [*EFJA*].
[89]*Ibid*, s 4(f); *Beals v Saldanha*, 2003 SCC 72, 234 DLR (4th) 1 [*Beals*].
[90]2014 SCC 59, [2014] 3 SCR 31.

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not relevant to his potential defence.[91] The court of appeal similarly rejected Arslan's claim that it was an error to find that he had exercised his right to contest YKBank's appeal. The Canadian concept of natural justice, in their view, did not require a full appellate review. There was no reason to interfere in the conclusion that Arslan had the opportunity to exercise his appeal rights to the extent allowed in Turkey.

The conclusion that the Turkish judgment was final was not free from error. The chamber judge should not have self-researched Turkish law, but this was not the basis of the decision. The chamber judge knew that foreign law must be decided through expert evidence. Arslan did not adduce expert evidence, but YKBank adduced expert evidence about the finality of a judgment under Turkish law, which was considered reliable.

Registration — insufficient notice — natural justice

Yantai Huahai International Trade Co v Yang, 2024 SKKB 24

The applicant, Yantai Huahai International Trade Corporation Limited, sought to register a default judgment obtained in China against the respondent, Yonggang Yang, under the *EFJA*.[92] The Saskatchewan Court of the King's Bench found the Chinese judgment was barred from registration as contrary to the principles of procedural fairness and natural justice.[93]

Yang did not receive notice of the commencement of the proceedings in sufficient time to present a defence, allowing default judgment. The court attempted personal service on Yang at an address in China, but service was not completed. Yang was later given notice of the claim through the public registry system, and his evidence that he had no knowledge of the court action or the claim prior to the Saskatchewan registration application was uncontradicted. According to Justice Peter Bergbusch, constructive notice through a public registry system is inadequate as only actual notice is sufficient.[94] He therefore found on a balance of probabilities that Yang did not receive actual notice in time to defend Yantai Huahai's claim before the Chinese court.

iii. Family

Recognition or enforcement of foreign divorce decree — talaq divorce

Dahroug v Hassan, 2024 ONCA 550[95]

This appeal concerned a motion judge's conclusion that there was no legal divorce between the parties. The appellant claimed that there was a legal divorce in the United Arab Emirates (UAE) in August 2010 by way of verbal pronouncement of talaq (or divorce under Islamic religious law). The motion judge had previously dismissed

[91] See *EFJA*, *supra* note 88, s 4(f).
[92] *Ibid.*
[93] *Ibid*, ss 4(d), (f).
[94] *Alternatifbank AS v Arslan*, 2016 SKQB 106 at paras 23–24.
[95] Motion judge's decision summarized in Ashley Barnes, "Canadian Cases in Private International Law in 2023" (2025) 61 CYIL at 28.

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his motion to recognize this divorce because it did not conform with the *Divorce Act*[96] or principles established in *Abraham v Gallo*.[97] There was no evidence of the divorce being granted under judicial or adjudicative oversight by a foreign authority. There was also no satisfactory evidence of foreign law to establish the validity of the divorce.

The Ontario Court of Appeal rejected the appellant's claim that his bare talaq divorce should be recognized as lawful in Canada and that the motion judge ignored key evidence. The appellant had not produced any expert or other admissible evidence that the divorce was overseen and granted by a judicial or adjudicative body or that it should otherwise be recognized in Canada consistent with the *Divorce Act*.[98]

Recognition or enforcement of foreign divorce decree — public policy — forum shopping

Vyazemskaya v Safin, 2024 ONCA 156

The parties were Russian citizens who married in Russia in 2012 and had their child. They immigrated to Canada in 2018 and became permanent residents. In November 2019, the appellant moved out of the matrimonial home after unsuccessful efforts to negotiate a separation agreement. Three days later, the appellant applied for a divorce in Russia, and the respondent filed an objection, taking the position that the case should be dealt with in Toronto. In January 2020, a Russian justice of the peace granted a divorce. No spousal support was available since, at the time of divorce, the respondent did not meet the conditions. If the divorce had been recognized in Canada, then the respondent would similarly be unable to seek spousal support in Canada.

The trial judge found that, while the parties had a real and substantial connection to Russia, the Russian divorce order should not be recognized in Ontario. The trial judge held that the public policy exception applied because the appellant had unfairly forum shopped and the Russian divorce was obtained to escape legal responsibilities in Ontario. The appellant argued that the trial judge erred by refusing to recognize the foreign divorce.[99]

The Ontario Court of Appeal considered the issue of unfair forum shopping tactics as a potential exception to the recognition of foreign judgments. The trial judge declined to recognize the Russian divorce on the basis of public policy relying on *Beals v Saldanha*.[100] The appellant argues that *Beals* focused on repugnant laws and that the trial judge should have conducted a comprehensive comparative analysis of Russian law. The court disagreed. The appellant's position did not look at the existence of other "nominate" defences established in *Beals* to the recognition of foreign divorces, including fraud and natural justice. *Beals* left unfair forum shopping tactics open as a possible exception. There had also been other trial decisions that refused to recognize foreign divorces for no or inadequate spousal support. The court concluded that, since *Beals* left open "unfair forum-shopping tactics" as an exception

[96]RSC 1985, c 3 (2nd Supp), s 22 [*Divorce Act*].
[97]2022 ONCA 874, 476 DLR (4th) 592.
[98]*Divorce Act*, *supra* note 96.
[99]Under *ibid*, s 22(3).
[100]*Beals*, *supra* note 89.

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to the recognition and enforcement of foreign divorce decrees, an exception existed that was analytically distinct from public policy.[101]

The appeal was dismissed. The appellant had not demonstrated a palpable and overriding error in the trial judge's decision not to recognize the Russian divorce order. The trial judge relied on the appellant engaging in unfair forum shopping tactics and receiving the Russian divorce pre-emptively, based on email correspondence evidence.

B. Québec

Reconnaissance d'une décision étrangère — articles 3155, 2822 CcQ

Eurobank Ergasias SA c Bombardier Inc, 2024 SCC 11[102]

This case involved an issuing bank refusing to honour a demand for payment under a letter of credit due to the fraud exception in Canadian law. National Bank of Canada issued the letter of a counter-guarantee under Quebec law to Bombardier Incorporated in favour of a Greek bank. Eurobank Ergasias SA Bombardier sought the letter for the purposes of arranging a transaction for the supply of aircraft to the Hellenic Ministry of Defense (HMOD). Eurobank issued a distinct letter of credit for the HMOD subject to Greek law. When the HMOD demanded payment under the Greek letter of credit, Bombardier sought an injunction in the Quebec Superior Court to stop National Bank from honouring the subsequent demand from Eurobank to honour the letter of counter-guarantee as a beneficiary. Bombardier alleged that the HMOD had committed fraud under Quebec's letter of guarantee and that, since Eurobank had known of, and participated in, that fraud, National Bank should be prevented from honouring Eurobank's demand for payment based on the fraud exception. A majority of the Supreme Court of Canada dismissed the appeal and confirmed the conclusion that National Bank should be enjoined from honouring Eurobank's demand for payment under the fraud exception.[103]

While the Greek courts had addressed the HMOD's responsibility under the Greek letter of credit, there was no petition in Quebec law to recognize or enforce those judgments under the Quebec Civil Code.[104] This raised some relevant private international law discussion about the status of the Greek judgments. Eurobank argued that, since the Greek courts held that the HMOD did not engage in fraud, the Quebec courts could not say otherwise. The majority concluded that the Greek judgments had no decisive relevance in the case. No party had sought the recognition and enforcement of the Greek judgments in Quebec.[105] Absent a successful application for recognition and enforcement, the Greek judgments were merely evidence that did not bind the Quebec courts, and any weight given to them was an issue of fact owed deference on appeal.[106] Adopting the reasoning of the appellate court, the

[101]*Ibid* at para 37.

[102]Appellate decision previously discussed in Ashley Barnes, "Canadian Cases in Private International Law in Canada in 2022" (2023) 60 CYIL 411 at 433.

[103]*Angelica-Whitewear Ltd v Bank of Nova Scotia*, [1987] 1 SCR 59, 36 DLR (4th) 161.

[104]*CcQ*, *supra* note 72.

[105]Under *ibid*, art 3155.

[106]*Ibid*, art 2822; *Canadian Forest Navigation Co v R*, 2017 FCA 39.

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decision to place little or no weight on an unenforceable foreign judgment could be justified if that decision did not give proper consideration to the relevant Canadian judgments if they raised other public order concerns.[107] A decisive factor had been the conclusion of the foreign courts that a party can disregard an order of an arbitral tribunal to which it has agreed to be subject. It was open to the court to give the Greek judgments no weight as mere facts rather than as executory judgments in measuring the conduct of the HMOD and Eurobank for the purposes of the letter of counter-guarantee.

In dissent, Justice Suzanne Côté took the view that the decisions of the Greek courts could not be ignored, stressing the importance of international comity both in giving factual effect to and enforcing a foreign decision. It was an error not to give factual effect to the Greek judgments.[108] There was no public policy rationale for not giving weight to the judgments of the Greek courts. Importing the public order exception or other similar considerations into the assessment of weight to be given to a foreign decision as a factual constraint was unsupported by any authority and contrary to the purposes of Article 2822.[109] Giving factual effect to a foreign decision is very different from applying foreign law, recognizing that decision or incorporating its solution into Quebec's legal order. Taking the Greek judgments into account, Côté J concluded that the HMOD's demand for payment under the letter of guarantee was not fraudulent. She would have allowed the appeal.

4. Choice of law (including status of persons) / Conflits de lois (y compris statut personnel)

A. Common law and federal

i. Property

Succession — applicable law — partial intestacy — renvoi

Corbin v Shepherds' Trust, 2024 ONSC 4402

The deceased was a Catholic priest who was living in Toronto at the time of his death in October 2020. The deceased left his last will and testament dated 15 June 2012 (referred to as the Ontario will) and also executed a will in Italy on 21 July 2009 (referred to as the Italian will). Barry Corbin brought this application as estate trustee. Corbin sought the court's advice to determine who was entitled to the deceased's real property and other Italian assets. Among the respondents were the deceased nearest kin — his nieces — who resided in Italy. Neither will seemed to have been drafted by a lawyer. The deceased's estate included a condominium and two real properties in Italy. The Italian will provided that all of the deceased assets in Italy and Canada were to be paid to the respondent, the Pontifical Delegation for the Shrine of the Holy House of Loreto, which was located in Italy, while the Ontario will included a revocation clause on all former wills. The Ontario will consisted of two requests

[107] *Beals*, *supra* note 89 at para 29.

[108] *CcQ*, *supra* note 72, art 2822; *Spar Aerospace Ltd v American Mobile Satellite Corp*, 2002 SCC 78, [2002] 4 SCR 205 at para 17.

[109] *CcQ*, *supra* note 72.

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for religious items and stated that any money remaining from the estate after debts had been paid should be made as a donation to the Shepherds Trust, which was located in Toronto. The Shepherds Trust is a group dedicated to the needs of retired diocesan clergy of the Archdiocese of Toronto.

While there was no issue with the validity of the wills, the question remained whether the Ontario will revoked the Italian will. The answer also impacted whether an Ontario court could completely dispose of the deceased property, wherever it was situated, or if it would give rise to a partial intestacy. The *Succession Law Reform Act* (*SLRA*)[110] includes conflict-of-law rules on whether the formal validity of the will is governed by the internal law of the place where (1) the will is made; (2) the testator was domiciled; (3) the testator had his habitual residence; or (4) the testator then was a national if there was in that place the body of law governing the will of nations.[111] An Italian lawyer gave expert evidence on the Italian laws of succession.

Justice Bernadette Dietrich of the Ontario Superior Court found that the Ontario will revoked the Italian will in its entirety. This resulted in a partial intestacy under the Ontario will of the deceased's real property in Italy, including the condominium. The real property in Italy passed to the deceased heirs as if he died intestate. Given the relevant principles, the law of Italy would apply to the effect of the Ontario will relating to the deceased's real property in Italy.[112] The Italian law determined the heirs that would take on a partial intestacy. Even if the *SLRA* did not apply[113] and *renvoi* resulted in application of Ontario law, the result would be the same under Ontario law. The nieces would be the heirs of the deceased's real property passing as an equal share under the partial intestacy.[114]

ii. Tort

Non-pecuniary damages — legislative cap — substantive or procedural law

Hillyer v Tilley, 2024 NLCA 35

This case involved a conflict between the laws of Newfoundland and Labrador and Nova Scotia due to injuries sustained in an automobile accident in Nova Scotia in 2005. The respondents were residents of Newfoundland and Labrador. They were passengers of a bus driven by the first appellant and owned by the second appellant. The respondents filed suits in Newfoundland and Labrador stating that it was the appropriate forum. In Nova Scotia, non-pecuniary damages for minor injuries due to automobile accidents were capped at twenty-five hundred dollars before 2010,[115] while there is no such legislative cap in Newfoundland and Labrador. The trial judge ruled that the law of Newfoundland and Labrador applied in calculating the plaintiff's claim for non-pecuniary damages without the existence of a cap.

[110]RSO 1990, c S 26, ss 34-41.
[111]*Ibid*, s 37(1)(a–d)
[112]*Ibid*, s 36(1)
[113]*Ibid*, s 34(c).
[114]*ibid*, s 47(5).
[115]*Automobile Accident Minor Injury Regulations*, NS Reg 94/2010, s 5; *Insurance Act*, RSNS 1989, c 231, s 113B(4).

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The appeal hinged on whether Nova Scotia's cap on damages was substantive or procedural law, thereby determining whether the law of the forum — in this case, Newfoundland — or that of Nova Scotia applied.[116] Justice Lois Hoegg of the Newfoundland Court of Appeal found that the trial judge erred in concluding that Nova Scotia's cap on damages was a procedural law. Damages that manifested the plaintiff's substantive right and calculating an award is not a procedural exercise. Every court must assess damages, and there is no material difference in how the two provinces do so. It was simply that the extent of the substantive right in Nova Scotia was more limited than in Newfoundland and Labrador. Hoegg JA allowed the appeal and ordered that the Nova Scotia cap on the amount of non-pecuniary damages, as a substantive law, applied to the respondent's injury claim.[117]

iii. Family

Validity of the marriage contract — applicable law — void

Irving v Irving, 2024 ONSC 102

The applicant and the respondent dated for four years in Canada and decided to travel to St. Lucia to visit the applicant's family. The applicant encountered issues with immigration when getting back into the country. The parties decided to return to St. Lucia and get married there. The main issues were the validity of a marriage contract in St. Lucia and the splitting of property. The respondent owned real property in Toronto, which was purchased in April 2007 after the marriage. The respondent's mother passed away in April 2019 and left a substantial share in another property to his siblings, and the respondent purchased his mother's share of the property, which he was entitled to do under the will.

The marriage contract was short and written by a lawyer and notary in St. Lucia. The contract stated that there was no community property, provided the parties kept their money separate, including what was brought in throughout the marriage. The contract also provided that each party was responsible for their own debt. The court had to determine four main issues, including whether the law of Ontario applied to the marriage contract. If Ontario law applied, then the marriage contract also had to comply with the requirements of the Ontario *Family Law Act* (*FLA*).[118] The applicant argued that the marriage contract was not valid and enforceable in any law in St. Lucia or Ontario. The respondent claimed that the marriage contract should be deemed valid and enforceable given that the court had jurisdiction over it, the parties knew what they were signing when entering the contract, and the assets were divided.

Justice Audrey Ramsay reviewed the relevant evidence, finding the applicant credible, but not the respondent. She also discussed the general principles of freedom to contract.[119] On whether Ontario law applied to a marriage contract made in St. Lucia, the contract was itself silent on the governing law. Under the Ontario *FLA*, a

[116]*Rules of the Supreme Court*, SNL 1986, c 42, Schedule D, rule 38.01.

[117]Applying *Tolofson v Jensen; Lucas (Litigation Guardian of) v Gagnon*, [1994] 3 SCR 1022; *Livesly v Horst Co*, [1924] SCR 605; *Traders Finance Corp v Casselman*, [1960] SCR 242 at 247; *Vogler v Szendroi*, 2008 NSCA 18; *Dingwall v Foster*, 2013 ABQB 424; *Henry v Henry Estate et al*, 2014 MBCA 84 at para 32.

[118]*FLA* ON, *supra* note 21.

[119]*Miglin v. Miglin*, 2003 SCC 24.

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marriage could be closely connected to Ontario if it was "where the parties intended to live, work and raise a family."[120] Ontario's internal law applied to the marriage contract.[121] The agreement was also a domestic contract within the meaning of the *FLA* relating to the ownership or division of property.[122]

Ramsay J nonetheless determined that the marriage contract did not meet the statutory requirements.[123] The contract was in writing, and the lawyer witnessed signatures. The issue, however, was that these signatures could not be found. When domestic contracts meet the formal requirements, the court can address if they should be enforced.[124] Even if the court had determined that the marriage contract met statutory requirements, there were other circumstances that vitiated it. The parties must be deliberate, and the agreement understood, and the formality of the contract must be free from any influence or duress.

Various factors supporting setting aside the agreement.[125] There was a dispute over the financial disclosure before marriage. Ramsay J found that there was a failure to disclose significant assets and liabilities, including the income from the respondent's workplace, the share of the mother's former property, the respondent's pension, and debts and liabilities. The applicant had no knowledge of the respondent's workplace income, and the court found that he failed to disclose this when the marriage contract was signed. There was also no disclosure by the respondent of the mother's former property or the existence and value of his pension. There was also no disclosure, negotiation, or consensus about the assets, and, therefore, the applicant could not have informed consent. Ramsay J then determined whether the applicant understood her legal rights when entering into the agreement, and he found that she did not. Relying on duress, the court found that there was illegitimate pressure on the applicant to sign the marriage contract, which amounted to a coercion of will. This pressure led her to believe that she had no option but to sign this contract. Ramsay J ultimately concluded that the marriage contract was overwhelmingly unfair to the applicant and, as such, was unenforceable.[126]

B. Québec

Testament valide et exécutoire — articles 2822, 2825, 3109 CcQ

Succession de Spiric, 2024 QCCA 84

This appeal involved a determination that a February 2020 will signed in Costa Rica by the late Slobodan Spiric was valid and enforceable. The appellant, who was the deceased's *de facto* partner, challenged the validity of the will on the grounds that the deceased did not have sufficient command of Spanish to make a will in that language and, as such, did not comply with the formalities of Costa Rican law. The trial judge

[120]*FLA* ON, *supra* note 21, s 58(a); *Jasen v Karassik*, 2009 ONCA 245, 305 DLR (4th) 723.
[121]FLA ON, *supra* note 21.
[122]*Ibid*, ss 51–52
[123]*Ibid*, s 55(1).
[124]*Ibid.*
[125]*Ibid*, s 56(4).
[126]Despite meeting the formal requirements in *ibid*, s 55(1) but breached s 56(4) (a–c).

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found the will to be presumptively authentic and that no facts had been put forward to rebut that presumption.[127] She also noted that the onus was on the appellant to demonstrate that the deceased's understanding of Spanish was insufficient. Documentary evidence, including the resumé that the deceased had prepared while he was employed by SNC Lavalin, however, attested to the sufficiency of his Spanish to make a will in the language.

The appeal was dismissed. The trial judge correctly applied the presumption of authenticity, contrary to the appellant's claim. She held that there were no serious legal grounds to satisfy her that the presumption was rebutted.[128] Based on the expert evidence, the trial judge also concluded that the Costa Rican will was valid as the documentary evidence showed the deceased had a sufficient command of the Spanish language to enable him to make a will drafted in that language. Nothing in the evidence indicated that the appellant and deceased were covered by Costa Rican law regarding common law spouses,[129] limiting his ability to dispose of his goods as he wished in a Costa Rican will. The sole object of the impugned judgment was to validate the Costa Rican will and declare it enforceable. Nothing prevented the appellant from still making a claim to assert her rights, if any, under the *Family Code* of Costa Rica.

Divorce — renvoi — *prescription* — *articles 3080, 3089, 3145 CcQ*

Droit de la famille — 24130, 2024 QCCS 510

The parties were married in Quebec but divorced in Senegal. The Senegalese divorce judgment did not address the splitting of two properties, including a duplex purchased by the wife and a condo purchased by the husband. The husband recognized the validity of the divorce judgment. Since Senegalese law could not address the two properties because they were situated in Quebec, the husband asked the Quebec Superior Court to split the proceeds of these family properties according to the CcQ.[130] The wife argued that the Quebec Superior Court did not have jurisdiction — all assets relating to their marriage should fall under the law of Senegal as this was their last common residence. She claimed that the Senegalese divorce judgment was final.

The husband essentially claimed that this was a situation of *renvoi* based on the choice-of-law rules of Senegal that enabled the authority to split the properties to come back to Quebec law. Justice Charles Bienvenu determined, however, that a situation of *renvoi* was prohibited by Article 3080,[131] which confirms that, when the choice-of-law rule in Quebec gives jurisdiction to a foreign law, it is a question of that internal law and not its choice-of-law rules.

[127] *CcQ*, *supra* note 72, art 2822.
[128] *Ibid*, art 2822.
[129] *Family Code of Costa Rica* (Código de Familia), Law No 5476 (1973), s 242.
[130] *CcQ*, *supra* note 72.
[131] *Ibid.*

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